IN THE MATTER OF LICENSE NO. R-15862 MERCHANT MARINER'S DOCUMENT NO. Z-456035 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Paul L. PECK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1762

Paul L. PECK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 28 May 1968, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for six months plus three months on nine months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as radio officer on board SS PRESIDENT TAFT under authority of the document and license above captioned, on or about 26 August 1967, Appellant wrongfully absented himself from the vessel, at Manila, Republic of the Philippines, for approximately eight and one half hours beyond the posted sailing time of the vessel.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

In view of the grounds for appeal stated no recitation of the presentation of evidence is needed.

The entire decision was served on 29 May 1968. Notice of appeal was timely filed on 13 June 1968. Appellant perfected his appeal on 1 December 1968.

FINDINGS OF FACT

On 26 August 1967, Appellant was serving as radio officer on board SS PRESIDENT TAFT and acting under authority of his license and document while the ship was at Manila, Republic of the Philippines. In view of the narrow issue presented on appeal no further findings of fact are needed.

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Examiner.

The sole question on appeal, as framed by counsel, is:

> Is a Hearing Examiner required, as a matter of Law, to impose a prior order of outright suspension where subsequent acts of misconduct are committed during a probationary period?"

APPEARANCE: James H. Ackerman, of Long Beach, California, by Carlton E. Russell, Esq.

OPINION

I

In the background of this case is the fact that when Appellant performed the act of misconduct involved here he was serving under an earlier order which provided for suspension, but stayed execution of the suspension pending completion of a stated period of probation.

Appellant argues that an examiner has discretion not to order execution of an earlier ordered suspension on probation, but may, if in his judgment it appears appropriate, invoke some lesser period of suspension.

Appellant cites 46 CFR 137.20-155(a), in which the language appears that an examiner's order will be given "only...after consideration of the prior record of the person charged," as allowing discretion in the invocation of an earlier ordered suspension on probation.

Analogies to the Federal Rules of Criminal Procedure and to procedures under the Uniform Code of Military Justice, 10 U.S.C. 801, et. seq., are urged. The analogies are rejected as inappropriate to proceedings under 46 CFR 137.

II

While Appellant's contention is that the six month suspension ordered by the examiner at the earlier hearing could be reduced by a later examiner finding a violation of probation, in essence it urges that the later examiner might ignore the existing order of suspension on probation. In short, while Appellant says that the six months, which we deal with in the instant case would be reducible to five, four, three or two months by the later examiner, the rationale would also include a reduction to one month, one day, or zero.

The "discretion" argued for could result in a complete disregard of a violation of probationary order.

III

Appellant cites a colloquy with the Examiner in the instant case which intimates that if this Examiner had not felt bound by the order of the earlier examiner he would have ordered a lesser suspension of Appellant's documents in the instant case. The fact is that the Examiner in this case did not order any effective suspension at all for the offense found proved in this case.

The rationale of the Examiner as expressed in this colloquy is disturbing. It implies that if no prior record existed at all he might have imposed no outright suspension for the instant offense (which in fact he did not). This is objectionable.

It implies also, however, that if the earlier examiner had not ordered a six months suspension on a stated period of probation in the earlier case, this Examiner would not have done so. Examiner are not authorized to pass upon the propriety of orders issued by other examiners.

IV

As a reductio as absurdum of Appellant's proposition, let it be supposed that the order of probation found violated was issued by the same examiner as found the violation.

If his earlier order had been appealed as "excessive" and been affirmed as appropriate, it would be inconceivable that he could fail to effectuate it. If it had not been appealed, and if no permissible petition to reopen had been submitted to him, could he properly reconsider his earlier order as being excessive? His initial order, which had become final, was based upon the record before him in that case.

It does not seem possible that he could be called upon or permitted to review the propriety of the first order for the sole reason that the probation he allowed had been violated in another case. As a practical matter, it does not seem that an examiner could "re-think" his earlier order, so as to find it inappropriate, only because his order had been violated. No more can he be permitted to review the propriety of another examiner's order.

V

To the single question raised by Appellant on this appeal, as quoted in the statement of "Bases of Appeal," above, the answer is

"Yes."

CONCLUSION

The order of the Examiner in this case was not only appropriate but was the minimum order of outright suspension that the Examiner could order.

ORDER

The order of the Examiner dated at Long Beach, California, on 26 May 1968, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 19 day of MAY 1969.

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